No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS MARKLE INTERESTS, LLC; P&F LUMBER COMPANY 2000, LLC; and PF MONROE PROPERTIES, LLC'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

The U.S. Fish & Wildlife Service and Intervenors Center for Biological Diversity and the Gulf Restoration Network labor unsuccessfully to persuade that land that does not and cannot conserve the dusky gopher frog is nevertheless "critical habitat" for the frog. Intervenors further suggest that Weyerhaeuser Company (Weyerhaeuser) and Markle Interests, et al. (collectively, the Family Landowners), do not even have standing to contest this regulation of their property. But a plain application of this Court's standing jurisprudence and a textually-moored interpretation of the Endangered Species Act (ESA) expose the weaknesses of their arguments.

The land owned by the Family Landowners and Weyerhaeuser is neither habitat nor essential to conserve the frog. Indeed, all concede this land *cannot* presently conserve the frog. Additionally, this Court's pragmatic approach to judicial review of agency decision-making under the Administrative Procedure Act (APA) requires courts to review, albeit deferentially, the Service's decision not to exclude lands from critical habitat.

The Court should reverse.

ARGUMENT

I

FAMILY LANDOWNERS HAVE STANDING TO CHALLENGE THE DESIGNATION OF THEIR LAND AS CRITICAL HABITAT

"There is ordinarily little question" of standing when a suit is brought by "an object of the action (or forgone action) at issue." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). The Family Landowners are the object of the Service's designation of their land as critical habitat for the dusky gopher frog. The designation is directed at their property in particular and restricts their plans to use the property. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967).

Intervenors—but not the Service—question Weyerhaeuser's and the Family Landowners' standing on ripeness grounds. Despite the critical habitat designation's status as final agency action, they argue that the Family Landowners must wait, suffer additional injuries caused by the critical habitat designation, and then belatedly litigate whether they should have been subjected to them in the first place. Intervenors' arguments do not merit consideration.

First, as the Fifth Circuit and district court correctly held, the critical habitat designation injures the Family Landowners because it reduces the value of their property. Pet. App. 13a; Pet. App. 98a-99a. The Service acknowledges "a property that is designated as critical habitat may have a lower market value" because "[p]ublic attitudes about the limits or restrictions that critical habitat may impose

can cause real economic effects to property owners." Pet. App. 13a. Intervenors may wish that markets reacted differently to critical habitat designations, but that does not make it so. Not only does the designation reduce the value of Family Landowners' property but this injury occurs immediately. As the Service acknowledges, "any reduction in land value due to the designation of critical habitat will happen immediately at the time of the designation." *Id.*[1]

Although this injury is sufficient to establish standing, the Court could also find standing on the alternative grounds that the critical habitat designation injures the Family Landowners by regulating their future use of the land. *See* March 12, 2012, Public Comment on Behalf of P&F Lumber (Pet. Jt. App. at JA60; *id.* at JA59). As the Service recognized, the Family Landowners "have invested a significant amount of time and dollars into their plans to develop this area[.]" Final Economic Analysis at 4-3 (¶ 73). The designation of their land as critical habitat will further increase their costs to use the land—by as much as $34 million—due to increased red tape and use restrictions. 77 Fed. Reg. 35,118, 35,140-41 (June 12, 2012). Intervenors assert that the precise dollar value of this injury will be easier to judge in hindsight, but this damage assessment does

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[1] *National Park Hospitality Association v. Department of Interior*, 538 U.S. 803 (2003), is inapposite. There, this Court held an interpretive regulation issued by an agency not charged with implementing the statute it was interpreting does not present a ripe controversy. That interpretive rule "d[id] not affect a concessioner's primary conduct" much less did it directly regulate it. *See id.* at 810. Here, by contrast, the agency charged with implementing the ESA issued a regulation that alters the regulatory regime governing the Family Landowners' property.

not defeat the Family Landowners' standing to challenge the designation. What matters for standing purposes is whether a plaintiff suffers some injury, not whether the injury is valued at $1 or $20 million. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'"). Family Landowners have established standing based on lost property value and the burdens imposed on their plans to use the property.

Intervenors' argument that this claim is unripe because the precise extent of these injuries will depend, in part, on additional agency action fares no better. This Court has repeatedly rejected such arguments, most recently in *U.S. Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807 (2016), and *Sackett v. EPA*, 566 U.S. 120 (2012). In both cases, this Court recognized a property owners' right to challenge agency actions that burdened their land, even though the full extent of those injuries would depend on subsequent agency action. *Hawkes*, 136 S. Ct. at 1813-16; *Sackett*, 566 U.S. at 124-27.

Intervenors' view of standing would unreasonably restrict judicial review under the APA. *Cf. Abbott Labs.*, 387 U.S. at 141 (discussing the strong presumption of judicial review under that statute). The Family Landowners and Weyerhaeuser have standing to challenge the designation.

II

THE ESA DOES NOT AUTHORIZE THE SERVICE'S DESIGNATION OF UNIT 1 AS CRITICAL HABITAT

A. Unit 1 Is Not "Habitat"

The Family Landowners' merits brief properly argues the Service cannot designate Unit 1 *critical habitat* under the ESA because it is not *habitat* for the frog at all. *See* Respondents' Br. on the Merits at 21, 26-28. The Service and the Intervenors fail to refute this argument. The Service may designate only "habitat" as critical habitat. 16 U.S.C. § 1533(a)(3)(A)(i). While the ESA does not define "habitat," the ordinary dictionary meaning of the term is "the place where a particular species of animal or plant is normally found." Habitat, Black's Law Dictionary (10th ed. 2014). Absent the features essential for a species to survive in a given place or area, land cannot be considered habitat or designated as critical habitat.

The Service fails to rebut this ordinary reading of the ESA. Instead, it claims that "habitat" must be read at least in part to mean an area in which a species would *not* normally be found or even survive without significant change to the area. But the Service fails to demonstrate how this interpretation of "habitat" is consistent with the text of the ESA. The text of the ESA, rather, requires any area designated as critical habitat to "contain the features essential for species conservation." The prior critical habitat designations the Service proffers are generally consistent with the ordinary definition of "habitat," but *inconsistent* with Unit 1 in this case. The ESA

allows designation of areas only when they are presently and actually habitat; neither past occupation nor remotely possible future habitability suffices to designate areas that are not presently actual habitat.

1. The ESA Cannot Be Read, as the Service Insists, To Mean That "Habitat" Includes Areas That Cannot Support a Species

The Service makes the argument that the ESA requires that "habitat" not necessarily be habitable. This is so, the Service says, because the ESA defines two kinds of critical habitat, occupied and unoccupied, and references the "features essential to conservation" only in connection with occupied habitat. Service Br. at 22-24. Under this reading, if all habitat is required to be habitable, *i.e.*, to have the "essential features," then the specification that occupied habitat have the "essential features" would be redundant. But this superficial reading of Section 1532(5)(A) wrongly divides Section 1532(5)(A) into sub-definitions, one for "occupied critical habitat" with one set of criteria applicable only to occupied areas, and another for "unoccupied critical habitat," with only a lone criterion. In the Service's reading, Section 1532(5)(A)(i) and (ii) are distinct and unconnected universes, unrelated to each other textually or structurally. This is wrong.

a. Section 1532(5)(A) Provides a Single Definition of "Critical Habitat" Whose Criteria Are Cumulative, Not Alternative to Each Other

The Service may designate "habitat" as "critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i). The ESA defines "critical habitat" in one provision of the code, which lists cumulative requirements for designation, the first two of which apply to occupied areas, and *all three* of which apply to unoccupied areas. 16 U.S.C. § 1532(5)(A)(i)-(ii). In other words, the criteria applicable to occupied areas under Section 1532(5)(A)(i) are also applicable to unoccupied areas. The ESA's structure and text demonstrate this. *See, e.g., Dean v. United States*, 556 U.S. 568, 577 (2009) (clear meaning of statute determined from text and structure).

Section 1532(5)(A) is a single definition of "critical habitat," not two separate definitions of occupied and unoccupied critical habitat. This structure requires that the definition be read as a whole, with subdivisions (i) and (ii) as *cumulative* rather than alternative requirements. Therefore, the requirements of (i), that the area contain "features" that are (1) "essential to [species] conservation" and (2) "require special management," apply to *all* critical habitat designations.[2] The Service must meet only

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[2] The Service incorrectly claims that requiring occupied critical habitat to have the "essential features" would be redundant if all critical habitat must have the "essential features." The presence of the essential features is only one of the two criteria included in (i). The other is that the features "require special management." There is a strong textual connection between the dictionary definition of "habitat" and the "essential features" provision of Section 1532(5)(A). Instead of being redundant, the

these two criteria for an occupied area. 16 U.S.C. § 1532(5)(A)(i). If the area is unoccupied, the additional criterion—that the area be essential for species conservation—applies and limits the Service's discretion. 16 U.S.C. § 1532(5)(A)(ii).

The connection of (i) and (ii) with "and" instead of "or" reinforces this reading. "Critical habitat" includes *both* occupied areas and unoccupied areas that meet the applicable criteria. If the criteria of (i) and (ii) were alternative instead of cumulative, they would not be joined with "and" but with "or." *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) ("or" is "almost always disjunctive.") (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013)).

Reading Section 1532(5)(A) the Service's way, as two mutually exclusive "subdefinitions," would misread the statute. It would allow that a given unoccupied area could lack the "features essential to species conservation" (*i.e.*, the species could not be conserved in that area) and yet somehow be "essential for species conservation" (*i.e.*, the species could not be conserved without the area). If an area cannot support

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"essential features" criterion is merely the minimal assurance that the designated area is, in fact, habitat. Section 1532(5)(A)(i) further provides that the "essential features" "require special management" and (ii) includes the additional requirement, applicable only to unoccupied areas, that the area be "essential for species conservation." Read this way, the "essential features" criterion applies to all areas designated, and is, therefore, not redundant. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011) ("the rule against giving a portion of a text an interpretation which renders it superfluous does not prescribe that a passage which could have been more terse does not mean what it says.").

a species, it cannot be essential to its conservation; no interpretation of the ESA which produces this result can be reasonable.

In the event of any ambiguity, the legislative history also confirms the reading that (i) and (ii) are cumulative, not alternative. *See* Respondents' Br. on the Merits at 32-36. Congress clearly intended that it be *more* difficult for the Service to designate unoccupied areas as critical habitat. The best reading of Section 1532(5)(A) to give effect to that intent is that Sections 1532(5)(A)(i) and (ii) establish cumulative criteria for designation. All critical habitat must have the "features" which are (I) "essential to conservation" and (II) "require special management." If unoccupied areas are to be designated, they must further be "essential for conservation." In this way, (ii) serves as a limiting and narrowing criteria, allowing occupied habitat to be designated upon meeting fewer criteria, and preventing designation of unoccupied habitat that does not meet both the basic criteria of (i) and the additional criterion of (ii).

b. The Service's Occasional Practice of Designating Incomplete Habitat Does Not Rescue Its Illegal Designation of Unit 1

The Service cites two cases as examples of designated critical habitat containing fewer than all of the essential features for conservation. But these examples support the Family Landowners' reading of "habitat." Neither case involves designations like Unit 1—an unoccupied area unconnected from or unrelated to additional areas that provide the remaining essential features for the balance of a species' life cycle.

Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Service, 616 F.3d 983, 988 (9th Cir. 2010), does not support the Service in this case. The question in *Home Builders* was whether vernal pools and their immediate surrounding areas could be designated as occupied critical habitat, where the pools themselves contained most but not all of the primary constituent elements (PCEs) for the species. The Ninth Circuit held that since the two portions of the designation *together* provided all four PCEs necessary for the habitat, the ESA did not require that both portions of the designated area supply all of the PCEs independently of the other.

In this case, on the other hand, the entirety of Unit 1—even if combined with immediately surrounding areas—lacks the complete set of PCEs for the frog. The Service concedes Unit 1 is far too remote from the other units or any other habitat to be considered connected with them in the sense that the vernal pools and immediate upland areas were in *Home Builders*. *Accord Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977, 983-84 (9th Cir. 2015) (designation of aquatic areas immediately adjacent to occupied fish habitat, where designated areas supplied water and sediment as a PCE).

Simply put, an area cannot be "essential to a species conservation" without consideration of the likelihood of whether it will contribute to that conservation at all. In the neighboring habitat examples upon which the Service relies—*Home Builders* and *Bear Valley*—that likelihood is clear. Here, on the other hand, it is exceedingly unlikely that the designation will ever conserve the frog—so how could it ever be considered *essential* for that

conservation? The Service has recognized this logic elsewhere if not here; it has in fact recently proposed to amend its Regulations for Listing Species and Designating Critical Habitat to adopt this very logic. *See* 83 Fed. Reg. 35,193, 35,198 (July 25, 2018) ("In order for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable likelihood that the area will contribute to the conservation of the species.").

2. The Service Does Not Offer a Definition of Habitat and Is Not Entitled To Deference

More importantly, the Service's purported "interpretation" of "habitat" is not a definition. It is, rather, an example of the Service's *ad hoc* application of the statute—a practice which involves different interpretations in each case, as the Service concedes. It is no more than a description of the Service's practice of designating critical habitat in an *ad hoc*—and occasionally inconsistent—manner and its preference to continue doing so. The Service's effort to tease a definition from some of its disparate applications of the statute is really nothing more than a litigation position, which is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).[3] Indeed, the Service's assertion that by determining critical

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[3] *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 708 (1995) is no help to the Service here. *Sweet Home Chapter* afforded *Chevron* deference to the Service's regulatory definition of "harm," but does not stand for the proposition that any and all of the Service's definitions under the ESA are entitled to deference.

habitat in this case (or any case) it has also defined it, for this case or on a case-by-case basis, is inconsistent with any accepted notion of a regulatory definition of a statutory term, whether entitled to deference or not.

The Service's position boils down to nothing more than "critical habitat is what we say it is." No objective, enforceable criteria that a court could apply to this or any future designation can be gleaned from the critical habitat designations identified by the Service. Absent any such principle, it does not serve the purpose of a definition. This Court has never afforded *Chevron* deference to such an unprincipled and circular position and should not start today.

3. The ESA Limits the Service to Designation of Areas That Are Critical Habitat When They Are Designated

The ESA defines the required characteristics of critical habitat in the present tense. *See* 16 U.S.C. § 1532(5)(A)(i) ("on which *are* found those . . . features . . . essential to the conservation of the species"); *id.* § 1532(5)(A)(ii) ("determination . . . that such areas *are* essential for the conservation of the species."). Congress's textual choice cuts against the Service's strained effort to say the existence of the frog on Unit 1 decades ago, or at some speculative time in the future, fits the statute. *See Scarborough v. United States*, 431 U.S. 563, 570 (1977) ("It is obvious that the tenses used through Title IV were chosen with care."); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003) ("We think the plain text of this provision, because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed.").

The ESA also defines the required characteristics as actually present ("are") rather than potentially or contingently present, which would be signified by "may be" or "could be." The use of conditional criteria is seen elsewhere within the ESA. *See, e.g.*, 16 U.S.C. § 1533(f)(1)(A) ("species that are, *or may be*, in conflict with construction or other development projects."); *see also id.* § 1361(a) ("certain species and population stocks of marine mammals are, or *may be*, in danger of extinction"). The use of "are" in Section 1532(5)(A), alongside the conditional "are, or may be" in the very next section, 16 U.S.C. § 1533(f)(1)(A), requires that the critical habitat definition be read to exclude areas that "may be" able to meet the criteria. *Nat'l Assoc. of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The Service's assertions that Unit 1 might be habitat, conditionally (if the landowners change their minds and dedicate significant money and effort to establish functional habitat on their property) and in the future (*i.e.*, after the condition is met), are not germane to whether the Service can designate Unit 1 *now*, because the ESA allows the Service to designate only those areas that meet the criteria at the time of designation.

B. Unit 1 Is Not "Essential" for Species Conservation Because It Is Not Even Adequate for Species Conservation

The Service argues that it should be able to designate Unit 1 as critical habitat because it is the closest thing to actual habitat for the frog in Louisiana. But that consideration does not render Unit 1 "essential" for the frog. The Service points to no textual evidence in Section 1532(5)(A), or elsewhere in the ESA, to indicate that "essential" means anything other than "cannot be conserved without it." Since Unit 1 lacks the "features essential for species conservation," the species cannot be conserved *with* it. This is not a reasonable interpretation of the ESA, and well outside the bounds of *Chevron* deference.

The balance of the Service and Intervenors' arguments on essentiality boils down to the proposition that absent areas that actually qualify as unoccupied critical habitat, the Service should be able to designate what it considers the next best thing, even if it falls far short of being minimally adequate. But the good intentions of an agency to supply what Congress has not provided do not amount to legal authority to do so. *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 460-61 (D.C. Cir. 2017) ("However much we might sympathize or agree with EPA's policy objectives, EPA may only act within the boundaries of its statutory authority.").

III

APA AND ESA ALLOW FOR JUDICIAL REVIEW OF THE SERVICE'S DECISION NOT TO EXCLUDE UNIT 1 FROM CRITICAL HABITAT

Section 4(b)(2) of the ESA authorizes the exclusion of areas from a species' critical habitat if the benefits of exclusion would outweigh the benefits of inclusion, provided that the exclusion would not result in the species' extinction. 16 U.S.C. § 1533(b)(2). The Service and the Intervenors argue that a decision not to exclude an area is immune from judicial review, because a court would have no "meaningful standard" and "no law to apply" in reviewing the decision, which therefore must be "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). To support the case against judicial review, they focus principally on how the ESA provides, without elaboration, that the Service "may" but not must exclude any area. This focus is misplaced.

A. The Service and Intervenors Ignore the Text of the APA When They Argue in Favor of Unreviewability of the Decision Not To Exclude Unit 1 from the Designation

To begin with, an exclusive attention to the word "may" would render idle the allowance for "abuse of discretion" review in the APA, 5 U.S.C. § 706(2)(A), because the grant of any discretion—*i.e.*, a "may" clause—would necessarily mean that the agency action is committed to agency discretion by law.[4] *See*

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[4] To be sure, judicial review of the statutory predicates for § 4(b)(2) discretion—that the benefits of exclusion outweigh the

Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 Colum. L. Rev. 55, 58-61 (1965). Further, the "no meaningful standard" and "no law to apply" rules are not tied to a particular clause of a statute. Instead, they inquire as to whether *any* rule of decision, whatever its source, exists for judicial resolution of a given controversy. *See* Kenneth Culp Davis, *"No Law To Apply"*, 25 San Diego L. Rev. 1, 4 (1988) (observing that the "no law to apply" standard "does not mean that reviewability requires a *statute* that provides a 'meaningful standard'"), *cited in* Br. Amici Curiae of Nat'l Ass'n of Home Builders, *et al.*, at 16 n.6. Thus here, it does not matter if the ESA lacks a specific standard to review a decision not to exclude under § 4(b)(2), because other sources of standards—such as the Constitution or the agency itself—can afford such a measure. Finally, a statute-specific approach for applying the "committed to agency discretion by law" exception would be particularly inappropriate, given the separate exception in the APA for "statutes that preclude judicial review." 5 U.S.C. § 701(a)(1). Congress would have had no reason to provide two distinct carve-outs to the APA's otherwise generous allowance for judicial review if both depended on whether the particular statute at issue precluded (by intent or design) such review.

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benefits of inclusion and that an exclusion would not lead to the species' extinction—would be available even under the Service's crabbed understanding of reviewability. That conclusion follows, however, not because such predicates pertain to the Service's discretion, but rather because an exclusion in their absence would implicate the APA's distinct allowance for judicial review of agency action "in excess of statutory . . . authority." 5 U.S.C. § 706(2)(C). For an agency cannot abuse a discretion that it does not have.

B. Neither the ESA's Text Nor Its Legislative History Supports the Arguments That the Decision Not To Exclude Is Unreviewable

Contrary to the Service's and the Intervenors' accounts, the argument against judicial review of § 4(b)(2) decision-making finds no support in the provision's statutory or legislative history. The original Endangered Species Act of 1973 lacked a definition of or process for designating critical habitat. *See* Pub. L. No. 93-205, §§ 1-17, 87 Stat. 884, 884-903 (1973). In 1978, the Court ruled in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (*TVA*), that the ESA required the preservation of endangered species (and, in *TVA*, the snail darter's critical habitat) "whatever the cost." *Id.* at 184. Responding swiftly to the decision, Congress amended the ESA in relevant part to require the Service to consider economic and other non-biological factors when designating critical habitat, and to authorize the agency to exclude areas from such habitat on account of excessive economic or other non-biological impacts. Pub. L. No. 95-632, §11(7), 92 Stat. 3751, 3766 (1978). Thus, far from supporting congressional intent, a construction of the "committed to agency discretion by law" bar that precludes review of the Service's § 4(b)(2) authority would thwart the 1978 Amendments' aim of "introducing some flexibility which will permit exemptions from the Act's stringent requirements." H.R. Rep. No. 95-1625, at 14 (1978).[5]

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[5] Although the House Report for the 1978 Amendments states that the Service's weighing of competing factors when designating critical habitat is discretionary, H.R. Rep. No. 95-1625, at 17, nothing in the Amendments' legislative history

C. Properly Allowing for Judicial Review Here Does Not Run Afoul of *TVA v. Hill*

For their part, Intervenors contend that judicial review of exclusion decision-making would run afoul of *TVA*'s admonition that federal courts "have no expert knowledge on the subject of endangered species, much less do [they] have a mandate from the people to strike a balance of equities on the side [of development]." *TVA*, 437 U.S. at 194. The Court's warning has no bearing here. In *TVA*, there was little question that the statute as then written required a "whatever the cost" result. *Id.* ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities."). *See* H.R. Rep. No. 95-1625, at 10 ("As the Act is currently written, . . . [t]he Secretary has no discretion to alter a critical habitat designation on the basis of the effect that such designation may have on the area."). Hence, the critical issue presented for decision was whether, *notwithstanding* the statute's plain command, a federal court could use its equitable discretion to fashion "a remedy 'that accords with some modicum of common sense and the public weal.'" *TVA*, 437 U.S. at 194 (quoting *id.* at 196 (Powell, J., dissenting)). In contrast here, allowing judicial review of exclusion decision-making would not invite the judiciary, in the face of a contrary congressional command, to weigh the benefits of endangered species protection with countervailing economic or other concerns. Instead, the courts would

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suggests that § 4(b)(2) gives the Service the discretion to act invidiously or irrationally.

merely review—with appropriate deference—the Service's exercise of a power that Congress has explicitly granted.[6] *Cf.* Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. Chi. L. Rev. 935, 939-40, 981 (2018) (arguing that agency cost-benefit analysis actually facilitates judicial review, and that courts "can . . . contribute to administrative rationality by correcting valuation errors that regulatory agencies commit and demanding that agencies offer explanations for their valuations that go beyond boilerplate").

D. Contrary to the Service's Arguments, the Service Has Developed Meaningful Standards for the Court To Apply When Reviewing Its Decision Not To Exclude Property from a Critical Habitat Designation

The Service resists even minimal judicial scrutiny, quibbling over the thrust of Justice Scalia's dissent in *Webster v. Doe*, 486 U.S. 592 (1988), Service Br. at 49 n.12, but the distinction the agency draws is beside the point. That instances may occur in which a court would truly have no law to apply, and thus no meaningful standard and no basis to review an agency's decision-making, is irrelevant. What *is*

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[6] Relatedly, Intervenors contend the 1978 Amendments merely directed the Service to incorporate economic considerations into its decision-making in the manner of the National Environmental Policy Act (NEPA)—namely, all procedure and no substance. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The analogy to NEPA is inapt since § 4(b)(2) is not all procedure; in addition to the consideration of economic impacts as part of the designation process, the provision affords a substantive power to alter the outcome of that process. There is nothing parallel to that in NEPA. *See id.* at 351.

relevant is that such instances should be quite few in number, owing to the availability of meaningful standards like the basic constitutional requirements of public-regarding and reasoned decision-making.[7] *See Webster*, 486 U.S. at 608 (Scalia, J., dissenting) ("[T]here is no governmental decision that is not subject to a fair number of legal constraints precise enough to be susceptible of judicial application—beginning with the fundamental constraint that the decision must be taken in order to further a public purpose rather than a purely private interest."). *See also County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (due process is violated by "the exercise of power without any reasonable justification in the service of a legitimate governmental objective . . ."). And as with most agency action, the Service's § 4(b)(2) decision-making can be effectively tested by judicial employment of just such standards.

But even if that were not so, judicial review would still be workable in this case because the Service itself has articulated a meaningful standard. *See INS v. Yang*, 519 U.S. 26, 32 (1996) ("Though the agency's discretion is unfettered at the outset, if it announces and follows . . . a general policy by which its exercise of discretion will be governed, an irrational departure from that policy . . . could

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[7] Another reason the number should be small is the constitutional mandate that all legislative grants of authority must contain an "intelligible principle" to guide the exercise of the granted power. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) ("Congress must lay down by legislative act an intelligible principle, and the agency must follow it.") (internal quotation marks removed). There is thus no reason why courts could not review agency action for, at the very least, conformity with the required intelligible principle.

constitute action [judicially reviewable under] the Administrative Procedure Act . . . ."), *cited in* Service Br. at 48. In denying an exclusion for Unit 1, the Service explained that it could not identify any "disproportionate costs."[8] JA190. Why then should a court not be allowed to review, under an appropriately deferential standard,[9] the Service's decision by the agency's own measure of "disproportionate costs"?[10]

Perhaps the Service seeks so assiduously to avoid review because, should it occur, the agency

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[8] Although not codified in regulation, the Service regularly employs the "disproportionate costs" standard in critical habitat designations. *See, e.g.*, 81 Fed. Reg. 59,046, 59,087 (Aug. 26, 2016) (various California amphibians); 81 Fed. Reg. 14,264, 14,307 (Mar. 16, 2016) (New Mexico meadow jumping mouse); 81 Fed. Reg. 3866, 3883 (Jan. 22, 2016) (two Florida plants); 79 Fed. Reg. 54,635, 54,645 (Sept. 12, 2014) (Georgia rockcress).

[9] Several former officials of the Department of Interior argue, as Amici, that the Service's exclusion decision-making is so complex that judicial review would necessarily be inappropriate. Br. of Am. Curiae Former Dep't of Interior Officials, at 17-19. But federal courts routinely review complex agency rule-making. Moreover, any advantage agencies may have over judges in resolving technical or scientific disputes is taken account of by the APA's deferential standards of review. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

[10] The Service's Amici contend that a focus on disproportionate costs mischaracterizes the agency's economic analysis which, properly understood, was merely "inconclusive as to whether benefits outweigh costs or vice versa." Am. Curiae Br. of Economists & Law Profs., at 5. That, however, is not how the Service understood its own analysis, *see* JA190, and the agency's reliance on a *post hoc* alternative rationale would be impermissible. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962).

would have quite a time defending its decision.[11] The economic impact to Unit 1 far exceeds that to any other Unit; in fact, the difference between Unit 1's impact and that of the next most affected Unit is *three orders of magnitude*. *See* JA75. And the Service would fare no better if its "no disproportionate costs" judgment were construed to mean that the costs to Unit 1 were not too much greater than the benefits to Unit 1. The Service did not even attempt to quantify the designation's benefits and, under any reasonable reckoning, a negative impact of millions of dollars versus an unknown but likely trifling benefit (given the marginal value of Unit 1's habitat) approaches the extreme cost-benefit disproportion that is a hallmark of administrative irrationality.[12] *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("One would not say that it is . . . rational . . . to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.").

The Service has wide discretion in assessing economic impact, and wide discretion in determining whether to exclude an area on account of economic or other impact. But the process that Congress

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[11] Intervenors think otherwise, pointing out that, per *TVA*, Congress has assigned endangered species an incalculable value. Intervenors Br. at 57. But if that were truly so, then no exclusion could ever be justified and § 4(b)(2)'s authorization would be rendered idle.

[12] The Service's Amici emphasize the ancillary benefits of critical habitat designation. *See, e.g.*, Am. Curiae Br. of Inst. for Policy Integrity, at 7. Even assuming their relevance, such benefits cannot rationally be weighed against the benefits of exclusion from critical habitat unless the two sets of benefits are commensurable, and the Service did not quantify those benefits, even while admitting that such quantification is possible. *See* JA 95-98.

established for exclusion decision-making is not a lawless one. The Service's § 4(b)(2) decision-making should be subject to review for invidiousness[13] and irrationality.

CONCLUSION

The Service slipped loose the textual restraints of the ESA when it designated Unit 1 critical habitat for the dusky gopher frog. Therefore, this Court should reverse the Fifth Circuit's decision to affirm the designation of Unit 1 as critical habitat. Further, it should hold that the courts may review the Service's decisions not to exclude property from a critical habitat designation.

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[13] Intervenors contend that invidious § 4(b)(2) decision-making is already reviewable because (i) it does not concern economic impact and (ii) exclusion decision-making is just one component of the entire process of designating critical habitat. *See* Intervenors Br. at 57-58. As for (i), it would be passing strange to deny review for the very thing—economic impact—that precipitated § 4(b)(2)'s enactment. As for (ii), § 4(b)(2)'s text makes clear that exclusion decision-making is separate from the designation of critical habitat: whereas its first sentence sets forth what must be done when the Service "designate[s] critical habitat," its second sentence gives the Service authority to exclude any area from "critical habitat," *i.e.*, habitat already designated as critical, not potential or inchoate critical habitat. Notably, the Service itself views the exclusion process as separate from the designation process. *See* Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 Fed. Reg. 7226, 7227 (Feb. 11, 2016) ("The second sentence of section 4(b)(2) outlines a separate, discretionary process . . . .").

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